# STATE OF MICHIGAN

# COURT OF APPEALS

AMERICAN FAMILY HOMES, INC, THOMAS PROSE, and MARIA PROSE,

Plaintiffs/Cross-Defendants-Appellants/Cross-Appellees,

V

GLENNBROOK BEACH ASSOCIATION,

Defendant/Cross-Plaintiff-Appellee/Cross-Appellant,

and

TOWNSHIP OF DEXTER,

Defendant-Appellee,

and

MICHIGAN STATE TREASURER, WASHTENAW COUNTY DRAIN COMMISSIONER, WASHTENAW COUNTY BOARD OF ROAD COMMISSIONERS/CHAIRMAN, SBC MICHIGAN, DTE ENERGY CO, CONSUMERS ENERGY CO, CHARTER COMMUNICATIONS, JOSEPH P. KELLY, PATRICIA A. KELLY, THOMAS H. NULF, GARY L. SOUTH, DIANNE J. SOUTH, LARRY DARWIN LAKE as Trustee for the LARRY DARWIN LAKE REVOCABLE TRUST, MICHELE A. LAKE as Trustee for the MICHELE A. LAKE REVOCABLE TRUST, CHARLES A SKELTON, ROBERT L. VONBERGE, ELAINE M. VONBERGE, OTTO K. RIEGGER, JOYCE E. RIEGGER, LARRY J. FERGUSON, ANDREA E. BOSTIAN-FERGUSON, CHRIS S. DONAJKOWSKI, THERESA L. DONAJKOWSKI, VINCENT P. STAHL, SR, ELAINE STAHL, VINCENT P. STAHL, JR,

UNPUBLISHED
May 28, 2013

Nos. 301489; 302331; 302780
Washtenaw Circuit Court
LC No. 05-000843-CH

LISA STAHL, RONALD H. KRASKA, PATRICIA L. KRASKA, RICHARD M. FRANKHART, GINA L. FRANKHART, ANN COURTNEY as Trustee for the ANN COURTNEY TRUST, JACOB DARRELL, RICHARD BEN OWEN, CHARLES F. MORTON, SUSAN F. MORTON, PAUL LOVETT, ANN M. LOVETT, MULTILAKE WATER & SEWER AUTHORITY, JOAN CRIMMINS, and JERRY VORVA,

Defendants.

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BILLIE WILLIAMS, KEN WILLIAMS, and JERRY VORVA,

Plaintiffs/Cross-Defendants-Appellees,

and

AMERICAN FAMILY HOMES, INC, THOMAS PROSE and MARIA PROSE,

Intervening Plaintiffs-Appellants,

V

GLENBROOK BEACH ASSOCIATION,

Defendant/Cross-Plaintiff-Appellee.

No. 301490
Washtenaw Circuit Court
LC No. 07-000938-CZ

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BILLIE WILLIAMS, KEN WILLIAMS and JERRY VORVA,

Plaintiffs/Cross-Defendants-Appellants,

and

AMERICAN FAMILY HOMES, INC, THOMAS PROSE and MARIA PROSE,

Intervening Plaintiffs/Appellees,

v

No. 301496

GLENNBROOK BEACH ASSOCIATION,

Defendant/Cross-Plaintiff-Appellee.

Washtenaw Circuit Court
LC No. 07-000938-CZ

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

These consolidated appeals were brought by members of the Glennbrook Beach Association (GBA). In Docket No. 301489, American Family Homes, Inc. (AFH), and Thomas and Maria Prose (the Proses)[1] appeal as of right the November 17, 2010, judgment in favor of the GBA regarding count III of the GBA's counterclaim against the Proses and awarding the GBA $5,540.20 in unpaid dues and special assessments. The issues raised in this appeal involve the trial court's determination that the GBA was entitled to governmental immunity under the Michigan Summer Resort Owners Act (the Act),[2] and that the GBA's actions did not constitute a governmental taking.

In Docket No, 301490, AFH and the Proses appeal as of right the November 17, 2010, judgment in favor of the GBA regarding count I of the GBA's counterclaim against Billie and Ken Williams (the Williamses), and count II of its counterclaim against Jerry Vorva (Vorva). The judgment awarded the GBA $4,440.20 in unpaid dues, special assessments, and lien recording fees against the Williamses; and $4,540.20 in unpaid dues, special assessments, and lien recording fees against Vorva. The issues raised in this appeal involve the constitutionality of the Act and whether the term of the GBA ended in 1977.

In Docket No. 301496, the Williamses and Vorva also appeal as of right the November 17, 2010, judgment in favor of the GBA regarding count I of the GBA's counterclaim against the Williamses and count II of its counterclaim against Vorva. The issues raised in this appeal also involve the constitutionality of the Act.

In Docket No. 302331, AFH and the Proses appeal as of right the trial court's January 12, 2011, order clarifying its opinion and order regarding the removal of property from the road easement. The issues raised in this appeal involve the permissibility of the GBA's special assessment under the Act.

[1] The Proses assert in their briefs on appeal that Thomas and Maria Prose are the current owners of the Property, and that AFH no longer has an interest in the Property. Additionally, it was represented that Thomas and Maria Prose have divorced and as part of the divorce decree, Maria Prose has relinquished all of her rights to the Property. No evidence of the above has been provided, so we will refer to the parties as "AFH and the Proses" as they were all listed as plaintiffs in the trial court.

[2] MCL 455.201, et seq.

Finally, in Docket No. 302780, AFH and the Proses appeal as of right, and the GBA cross-appeals as of right, the trial court's February 9, 2011, order denying the GBA's motion for case evaluation sanctions and denying *sua sponte* the parties' requests for taxable costs. AFH and the Proses argue in this appeal that the trial court erroneously found that they were not the prevailing party and were not entitled to taxable costs. The GBA in turn challenges the trial court's determination that it was not entitled to case evaluation sanctions. We affirm in part, reverse in part, and remand the matter to the trial court for proceedings consistent with this opinion.

## I. CONSTITUTIONALITY OF THE ACT[3]

As a brief overview, the Act, which was enacted in 1929, permits ten or more property owners "to form a summer resort owners corporation for the better welfare of said community and for the purchase and improvement of lands to be occupied for summer homes and summer resort purposes" by filing articles of incorporation.[4] The property owners with their "successors and assigns" become "a body politic and corporate, under the name assumed in their articles of [incorporation] and shall have and possess all the general powers and privileges and be subject to all the liabilities of a municipal corporation and become the local governing body."[5]

All property owners "in the county of [the corporation's] organization" with property that is "contiguous to the resort community in which the corporation is organized" are eligible for membership in the corporation.[6] All members must "file with the secretary of [the corporation] a writing" granting the corporation "the right to exercise all jurisdiction, conferred by [the Act], over the lands owned by" the member.[7]

The corporation is governed by an elected board of trustees which has the power to enact by-laws and "mange[] and control . . . all [of] the business and all the property, real and personal, of the corporation and shall represent the corporation, with full power of authority to act for it in all things legal whatsoever," subject to the "restrictions or limitations imposed by the by-laws of the corporation and any special restriction or limitation imposed by a vote of the members at any annual or regularly called special meeting."[8] The board may also require that the corporation's members "pay annual dues and special assessments for any purpose authorized under [the Act]" after the requisite member approval.[9]

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[3] Docket Nos. 301490 and 301496.

[4] MCL 455.201.

[5] MCL 455.204.

[6] MCL 455.206.

[7] MCL 455.207.

[8] MCL 455.209; MCL 455.210; MCL 455.212.

[9] MCL 455.219.

AFH, the Proses, the Williamses and Vorva (collectively "the homeowners") argue that the Act is unconstitutional on its face and as applied. We disagree.

First, we are not persuaded by the homeowners' argument that the decisions in *Whitman v Lake Diane Corp*[10] and *Baldwin v North Shores Estates Ass'n*[11] should persuade this Court to find that the Act is unconstitutional. The Court in *Whitman* indicated that the failure to define the term "freeholder" caused the voting provision at issue in that case to be unconstitutionally vague.[12] The *Whitman* Court's finding, however, does not persuade this Court that the remainder of the Act is unconstitutionally vague simply by virtue of the word "freeholder" being used. "When a word is undefined in a statute, resort to the standard dictionary definition is an appropriate means of determining its common and approved usage,"[13] and a dictionary definition of "freeholder" exists.[14] Additionally, the *Whitman* Court acknowledged that "the . . . dispute [was] not the first in which the basic constitutionality of the summer resort owners corporation act ha[d] been called into question," yet still failed to find the Act in its entirety unconstitutional.[15]

The homeowners are correct that the *Baldwin* Court indicated that because several terms, including "summer resort," were undefined "the entire act border[ed] on unconstitutionality by reason of its vagueness."[16] That notwithstanding, as aptly noted by the *Baldwin* Court, we construe legislation in a constitutional manner if possible, and because the homeowners have not clearly shown the Act's unconstitutionality as required, we find that the argument lacks merit.[17]

Second, we have reviewed the additional constitutional arguments raised below, as well as the unpreserved arguments raised for the first time on appeal,[18] and find that relief is not warranted.

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[10] *Whitman v Lake Diane Corp*, 267 Mich App 176; 704 NW2d 468 (2005).

[11] *Baldwin v North Shore Estates Ass'n*, 384 Mich 42; 179 NW2d 398 (1970).

[12] *Whitman*, 267 Mich App at 182.

[13] *Shinkle v Shinkle*, 255 Mich App 221, 226; 663 NW2d 481 (2003).

[14] "Freeholder" has been defined as "the owner of a freehold;" and a "freehold" is "an estate in land, inherited or held for life," "a form of tenure by which an estate is held in fee simple, fee tail or for life," or "an estate held by freehold." *Random House Webster's College Dictionary* (1997).

[15] *Whitman*, 267 Mich App at 179.

[16] *Baldwin*, 384 Mich at 49.

[17] *Id*. at 49-50; *Associated Builders & Contractors v Dep't of Consumer and Indus Servs Dir (On Remand)*, 267 Mich App 386, 390, 397; 705 NW2d 509 (2005).

[18] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

## II. TERM OF THE GBA[19]

AFH and the Proses assert that the term of the GBA expired in 1977. We disagree, and find that the term of the GBA has not expired.

This issue was raised in a motion for summary disposition brought pursuant to MCR 2.116(C)(9) and (C)(10). A trial court's decision on a motion for summary disposition is reviewed de novo.[20] MCR 2.116(C)(9) "tests the sufficiency of a defendant's pleadings."[21] In deciding a motion under this subsection, "the trial court must accept as true all well-pleaded allegations[.]"[22] Summary disposition is proper where "a defendant fails to plead a valid defense to a claim" and "the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery."[23]

"A motion brought under MCR 2.116(C)(10) tests the factual support for a claim."[24] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in the light most favorable to the party opposing the motion."[25] Summary disposition is proper under this subsection if the evidence demonstrates that "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[26]

Pursuant to MCL 455.202, a corporation such as the GBA shall have a term of existence "not [to] exceed 30 years." The GBA, however, is permitted "by a vote of 2/3 of its capital stock, at any annual meeting, to direct the continuance of its corporate existence for such further term not exceeding 30 years from the expiration of the existing term, as may be expressed in a resolution for that purpose."[27] The renewal term "shall begin from the expiration of the former

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[19] Docket No. 301490.

[20] *Abela v Gen Motors Corp*, 257 Mich App 513, 517; 669 NW2d 271 (2003).

[21] *Id*. (citation and quotation marks omitted).

[22] *Id*. (citation and quotation marks omitted).

[23] *Id*. at 517-518 (citations and quotation marks omitted).

[24] *Steinmann v Dillon*, 258 Mich App 149, 152; 670 NW2d 249 (2003).

[25] *Karbel v Comerica Bank*, 247 Mich App 90, 96-97; 635 NW2d 69 (2001) (citation and quotation marks omitted).

[26] *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011).

[27] MCL 455.251.

term."[28] The Act also permits a corporation to reorganize and to renew, continue or extend the corporate term for not more than 30 years from the expiration of its former term.[29]

Here, the GBA was incorporated under the Act on August 6, 1947. The term of the corporation's existence was 30 years. Thus, the term was to expire on August 6, 1977. On May 3, 1976, the Michigan Department of Commerce advised the GBA that its term of existence could be extended by a vote of a majority of the members entitled to vote for a "perpetual" term or for a "specific number of years." On August 28, 1976, the articles of incorporation for the GBA was amended to have a "perpetual" term of existence. Although nonprofit corporations are permitted to have a perpetual existence, the GBA, which was created under the Act, is not permitted to have a perpetual term.[30] Therefore, the amendment to the articles of incorporation exceeded the scope authorized by statute. However, because the Act permits extending the term of the GBA 30 years from the date of the expiration of the former term, and there was no evidence presented that the procedure used to amend the articles of incorporation in 1976 was improper, we find that the 1976 amendment had the effect of extending the corporate life until August 6, 2007.[31]

According to the record, a general membership meeting was held on June 16, 2007, to discuss extension of the GBA's corporate life. The meeting was followed by a board meeting to vote on an amendment to the bylaws to change the place of the annual membership meeting to Dexter Township, and the date to the second Saturday in July. Evidence was presented that notice of the June 16, 2007, meeting and a copy of the amended bylaws was provided to the members of the GBA.

An annual membership meeting was set for July 14, 2007, and appropriate notice of the meeting, as well as proxy forms, were provided to the GBA's members on June 28, 2007. On July 14, 2007, the members of the GBA voted to extend the corporate life of the GBA for an additional 30 years pursuant to MCL 455.251. Eighty six percent of the members voted to approve the resolution.

AFH and the Proses argue that if the corporation was in existence in 2007, a second extension of the corporate term was not permitted. As aptly noted by the GBA, the statutes regarding extension of the corporate term refer to extension of the corporate term from "the expiration of its former term,"[32] and indicate that continuance of the corporate term shall not exceed 30 years from the expiration of its existing term.[33] The statutes in no way limit the

[28] MCL 455.252.

[29] MCL 455.281.

[30] MCL 455.202.

[31] MCL 455.251; 455.281.

[32] MCL 455.281.

[33] MCL 455.251.

number of extensions that are permitted, and statutory "language is read according to its 'ordinary and generally accepted meaning.'"[34] Also, such a limitation is not supported by the case law. Accordingly, the evidence supports that the GBA still exists.

## III. GOVERNMENTAL IMMUNITY[35]

AFH and the Proses argue that the trial court erred when it found that the GBA was immune from suit based on a theory of governmental immunity. We disagree. We review de novo a trial court's decision on the question of law of governmental immunity.[36]

> A trial court may grant a motion for summary disposition under MCR 2.116(C)(7) on the ground that a claim is barred because of immunity granted by law. To survive a motion raised under MCR 2.116(C)(7), the plaintiff must allege specific facts warranting the application of an exception to governmental immunity.[37]

"The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence."[38] The evidence submitted is viewed in favor of the party opposing the motion, and summary disposition is proper under this subsection if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law.[39]

Pursuant to the relevant statute, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."[40] Thus, the first issue to resolve is whether, under the relevant statute, the GBA is a governmental agency. A "governmental agency" is defined as "the state or a political subdivision."[41] A "political subdivision" includes:

> a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or

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[34] *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 287-288; 818 NW2d 460 (2012).

[35] Docket No. 301489.

[36] *Kendricks v Rehfield*, 270 Mich App 679, 681-682; 716 NW2d 623 (2006).

[37] *McLean v McElhaney*, 289 Mich App 592, 597; 798 NW2d 29 (2010).

[38] *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011) (citations omitted).

[39] *Id*.

[40] MCL 691.1407.

[41] Former MCL 691.1401(d).

> authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.[42]

A "'[m]unicipal corporation' means a city, village, or township or a combination of 2 or more of these when acting jointly."[43]

> MCL 455.204 indicates in part that the persons associating under the Act:
> shall become and be a body politic and corporate, under the name assumed in their articles of [incorporation] and shall have and possess all the general powers and privileges and be subject to all the liabilities of a municipal corporation and become the local governing body.

In the instant case, we find that because the GBA was authorized by law to be subject to "all of the liabilities of a municipal corporation," and a municipal corporation is a governmental agency, the GBA is thus a governmental agency.

The trial court relied on the case of *Bates v Colony Park Ass'n*,[44] to make its determination that the GBA was entitled to the protections of governmental immunity. The *Bates* court interpreted the Act and found that the township at issue in that case was subject to governmental immunity.[45] As correctly noted by AFH and the Proses, *Bate*s is not binding on the trial court or this Court.[46] Contrary to AFH and the Proses' assertion, however, such a case can be given persuasive value.[47] Based on our finding above, we are not persuaded that *Bates* was improperly decided.

Next, it must be determined if the alleged injury to AFH and the Proses' property occurred during the exercise of a governmental function. The relevant statute defines a "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."[48] Here, MCL 455.210 authorizes the GBA's board of trustees to "manage[] and control . . . all the business and all the property, real and personal, of the corporation[.]" A review of AFH and the Proses' allegations regarding counts III, IV and V in the third amended complaint reveals that they arise out of the GBA's alleged negligent failure maintain a drain, which AFH and the Proses assert belongs to the GBA. Thus, the record evidence supports that AFH and the Proses' allegations arise out of the GBA's alleged exercise of a governmental function. Moreover, AFH and the Proses do not allege that

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[42] Former MCL 691.1401(b).

[43] Former MCL 691.1401(a).

[44] *Bates v Colony Park Ass'n*, 393 F Supp 2d 578 (ED Mich, 2005).

[45] *Id*. at 594-595.

[46] *Vanderpool v Pineview Estates, LC*, 289 Mich App 119, 124 n 2; 808 NW2d 227 (2010).

[47] *Id*.

[48] Former MCL 691.1401(f).

an exception to governmental immunity applies to the instant case, nor do we find that one applies. Therefore, viewing the evidence in the light most favorable to AFH and the Proses, the trial court's grant of summary disposition in favor of the GBA on the grounds of governmental immunity was proper.[49]

## IV. GOVERNMENTAL TAKING[50]

AFH and the Proses also assert that the trial court erred when it found that the GBA's actions did not constitute a governmental taking based on inverse condemnation. We disagree. The trial court made its ruling in response to a motion for summary disposition brought by the GBA pursuant to MCR 2.116(C)(10), the standard of review for which is outlined above.

"An inverse condemnation suit is one instituted by a private property owner whose property, while not formally taken for public use, has been damaged by a public improvement undertaking or other public activity."[51]

> The plaintiff has the burden of proving causation in an inverse condemnation action. A plaintiff may satisfy this burden by proving that the government's actions were a substantial cause of the decline of its property. The plaintiff must also establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property.[52]

AFH and the Proses alleged that the GBA performed "overt and intentional acts" that interfered with the use and enjoyment of their property. The GBA is correct that such overt and intentional acts were not described in any manner in AFH and the Proses' fourth amended complaint. Rather, AFH and the Proses continued to allege that the GBA failed to maintain a drain that resulted in flooding and damage to their property. The alleged failure to act by the GBA does not satisfy the requisite affirmative act by the government necessary to succeed on a claim of governmental taking by inverse condemnation.[53] Additionally, AFH and the Proses failed to present any evidence of an affirmative act by the GBA as required. Therefore, the trial court's grant of summary disposition of this claim in favor of the GBA was proper.[54]

AFH and the Proses argue that the trial court's grant of summary disposition was premature because of a protective order regarding discovery previously granted by the trial court.

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[49] *Snead*, 294 Mich App at 354.

[50] Docket No. 301489.

[51] *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004).

[52] *Id*. at 130 (citations omitted).

[53] *Id*.; See also *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 550; 688 NW2d 550 (2004).

[54] *Anzaldua*, 292 Mich App at 630.

Discovery, however, was reopened on November 28, 2007, over nine months before the GBA filed the instant motion. Thus, we find no merit to this assertion.

## V. SPECIAL ASSESSMENTS[55]

AFH and the Proses argue that the trial court erred when it determined that they were responsible for unpaid special assessments. We disagree. This finding was made by the trial court in response to a motion for summary disposition brought by the GBA pursuant to MCR 2.116(C)(10), the standard of review for which is above.

To the extent that AFH and the Proses argue that special assessments were improper because the Act is unconstitutional, those arguments lack merit based on our previous finding that the Act is constitutional.

Pursuant to MCL 455.219(1), "[t]he board of trustees may require that the members of a corporation [such as the GBA] pay annual dues and special assessments for any purpose authorized under [the Act]." Approval of a majority of the members of the GBA is necessary to require the payment of special assessments by members, "[u]nless the members by a vote of a majority of all of the members have by resolution specifically provided for approval by a majority of the votes cast by the members voting."[56] The bylaws of the GBA indicate that the "members may make a special assessment against members based on a per cottage/home, per lot or other basis which the membership determines bears a rational relationship to the purpose of the assessment."

Based on the evidence presented, at the time of the special assessments, AFH and the Proses were members of the GBA. The members of the GBA appropriately voted in compliance with the bylaws to assess its members for the legal fees to defend against litigation brought by the homeowners on August 25, 2001, August 12, 2006, July 14, 2007, July 12, 2008, December 2, 2006, and May 2, 2009. There was no evidence presented that AFH and the Proses were unable to vote regarding the assessments.

The GBA has jurisdiction over the lands it owns and the lands owned by its members.[57] Additionally, the GBA's board of trustees has the power, in part, to manage and "control . . . all of the business and all the property, real and personal, of the corporation and shall represent the corporation, with full power of authority to act for it in all things legal whatsoever[.]"[58] The legal actions defended against by the GBA involved the easement rights of AFH and the Proses, alleged damage to AFH and the Proses' property as the result of alleged inaction by the GBA to maintain a drain, the constitutionality of the Act, and for the collection of unpaid dues, special

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[55] Docket No. 302331.

[56] MCL 455.219(2).

[57] MCL 455.211.

[58] MCL 455.210.

assessments and liens allegedly owed by the homeowners. Thus, we find that the special assessments that the members voted to impose on themselves were authorized under the Act, and as such were proper.[59] Moreover, the amount owed by the Proses in unpaid special assessments was undisputed.

AFH and the Proses presented no evidence that the special assessments were imposed on them differently than any of the other GBA members. And, the imposition of special assessments on the members was determined by the members and not the GBA. As such, any argument that the government violated AFH and the Proses' rights to equal protection or procedural due process by requiring that they pay the special assessments must fail. Accordingly, there was no error by the trial court.[60]

## VI. TAXATION OF COSTS[61]

AFH and the Proses also contend that the trial court erred when it found that they were not the prevailing party, and thus were not entitled to taxable costs. We disagree. "The determination whether a party is a 'prevailing party' for the purpose of awarding costs under MCR 2.625 is a question of law, which this Court reviews de novo."[62] "We review a trial court's ruling on a motion for costs under MCR 2.625 for an abuse of discretion."[63] "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes."[64]

"[O]nly the prevailing party is entitled to recover costs."[65] "In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count."[66] While recovery of "less than the full amount sought is not dispositive of whether [a party is] the prevailing party," "mere recovery of some damages is not enough[.]"[67] "[I]n order to be

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[59] MCL 455.219.

[60] *Anzaldua*, 292 Mich App at 630.

[61] Docket No. 302780.

[62] *Fansler v Richardson*, 266 Mich App 123, 126; 698 NW2d 916 (2005).

[63] *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 367; 737 NW2d 807 (2007).

[64] *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 211; 823 NW2d 843 (2012) (citation and quotation marks omitted).

[65] *Ivezaj*, 275 Mich App at 368.

[66] MCR 2.625(B)(2).

[67] *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998).

considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation."[68]

Here, AFH and the Proses prevailed in part on their claim for equitable relief regarding the easement. While they requested a declaratory judgment that the easement was for the exclusive benefit of their property, the trial court agreed in part and found that they were entitled to use the easement, but they had "no greater rights to use the [easement] than any other lot owner in the subdivision" and granted them a "perpetual, non-exclusive easement for ingress and egress."

Additionally, summary disposition was granted in the GBA's favor regarding counts III, IV, V and VII of AFH and the Proses' third and fourth amended complaints regarding alleged damage to their property as a result of the GBA's failure to maintain a drain. Moreover, the GBA prevailed on its motion for summary disposition of count III of its counterclaim against the Proses for unpaid dues and special assessments, and the GBA obtained a judgment in its favor in the amount of $5,540.20. Thus, we find that there was no abuse of discretion by the trial court in finding that AFH and the Proses were not the prevailing party.[69]

AFH and the Proses argue that the trial court's *sua sponte* ruling regarding taxation of costs was premature. The trial court, however, presided over the entire action which spanned more than five years. Thus, we find that the argument lacks merit.

## VII. CASE EVALUATION SANCTIONS[70]

Finally, the GBA argues that the trial court erred when it failed to award it case evaluation sanctions. We agree. "A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo."[71]

Pursuant to the relevant court rule, "[i]f a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation."[72] "Verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation."[73] A "verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation."[74]

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[68] *Id*.

[69] *Id*.; *Van Elslander*, 297 Mich App at 211.

[70] Docket No. 302780.

[71] *Van Elslander*, 297 Mich App at 211 (citation and quotation marks omitted).

[72] MCR 2.403(O)(1).

[73] MCR 2.403(O)(2)(c).

[74] MCR 2.403(O)(3).

"Actual costs" are defined as "(a) those costs taxable in any civil action, and (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation."[75] Under this court rule, "a rejecting plaintiff who is liable for a defendant's attorney fees is only liable for those fees that accrued after the case evaluation as a consequence of defending against the rejecting plaintiff's theories of liability and damage claims."[76]

Here, case evaluation of the claims of AFH, Thomas Prose, and the GBA was held on July 8, 2010. The panel unanimously awarded Thomas Prose and AFH $40,000 against the GBA. Nothing was awarded in the GBA's favor. While the GBA accepted the award, AFH and Thomas Prose rejected the award. Thereafter, the parties stipulated to dismiss counts II and VI of AFH and the Proses' fourth amended complaint, as well as count II of the GBA's counterclaim against the Proses. The GBA then filed a motion for summary disposition regarding their claim against the Proses for unpaid dues, special assessments, and fees, which was count III of its counterclaim against them. The trial court found in favor of the GBA and entered judgment against the Proses in the amount of $5,540.20 for unpaid dues and special assessments. Because AFH and Thomas Prose rejected the case evaluation award, which the GBA accepted, and the GBA subsequently obtained a verdict more favorable to it than the case evaluation award, the trial court erred when it denied the GBA's motion for case evaluation sanctions.[77]

AFH and the Proses contend that the "interest of justice" exception applies. "If the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs."[78] "The term 'interest of justice' in MCR 2.403(O)(11) must not be too broadly applied so as to swallow the general rule of subsection 1 and must not be too narrowly construed so as to abrogate the exception."[79] Thus, "if the trial court finds on the basis of all the facts and circumstances of a particular case and viewed in light of the purposes of MCR 2.403(O) that unusual circumstances exist, it may invoke the 'interest of justice' exception found in MCR 2.403(O)(11)."[80] The examples of unusual circumstances involve situations where "there is a public interest in having an issue judicially decided rather than merely settled by the parties. In such cases, this public interest may override [the court rule's] purpose of

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[75] MCR 2.403(O)(6).

[76] *Van Elslander*, 297 Mich App at 213-214 (citation and quotation marks omitted).

[77] MCR 2.403(O)(1), (3).

[78] MCR 2.403(O)(11).

[79] *Haliw v City of Sterling Hts*, 266 Mich App 444, 448; 702 NW2d 637 (2005) (citation and quotation marks omitted).

[80] *Id*. at 449.

encouraging settlement."[81] The trial court, however, is required to "articulate the bases for its decision."[82]

In the instant case, the "verdict" resulted from a motion for summary disposition filed by the GBA. The resolution of the issues did not involve a situation in which there was a public interest. Additionally, assuming arguendo that there was a public interest, the trial court did not indicate that the "interest of justice" exception applied or articulate reasons for its decision to lead this Court to imply that it was applying the exception. Rather, the trial court found that for the reasons asserted by AFH and the Proses, the GBA was not entitled to case evaluation sanctions. Regarding case evaluation sanctions, AFH and the Proses did not argue below that the "interest of justice" exception should apply. Thus, we find AFH and the Proses' argument to lack merit.

AFH and the Proses argued below that pursuant to the court rule "[t]he evaluation [award] must include a separate award as to each plaintiff's claim against each defendant and as to each . . . counterclaim . . . that has been filed in the action."[83] AFH and the Proses assert that the case evaluators erred because they failed to "put an award for every offensive claim by every plaintiff against the GBA. And then an award for every . . . counterclaim by the GBA against each defendant." The remainder of their argument at the motion hearing pertained to whether the GBA was the prevailing party in order to tax costs pursuant to MCR 2.625, and is not applicable to the instant analysis.

AFH and Thomas Prose were named as the parties who participated in case evaluation with the GBA. While AFH and the Proses argued below that Maria Prose was also entitled to an evaluation award, her claims were brought jointly with Thomas Prose and AFH. Additionally, Thomas Prose admits on appeal that he now holds Maria Prose's interest, as well as the interest of AFH. Thus, any error in failing to include her name as a party for the purposes of case evaluation was harmless. Moreover, the court rule notes that all claims "filed by any one party against any other party shall be treated as a single claim."[84] Therefore, there was no error by the evaluators in noting a single award against the GBA in favor of AFH and Thomas Prose.

AFH and the Proses assert that had they accepted case evaluation, they would have been required to "relinquish" the relief they already obtained, and would have been prohibited from appealing any prior rulings of the trial court. Assuming arguendo that their assertion is correct, such a result does not exempt them from liability for case evaluation sanctions under the court rule.[85] Additionally, they claim that as a result they were unable to accept case evaluation.

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[81] *Id*.

[82] *Id*.

[83] MCR 2.403(K)(2).

[84] *Id*.

[85] MCR 2.403(O).

While strategically they may not have wanted to accept case evaluation, there is no evidence to suggest that doing so would have been "legally impossible" as they assert.

Accordingly, we remand the matter to the trial court for a determination of the GBA's actual costs from the date of case evaluation, and entry of an order in favor of the GBA and against AFH and the Proses for case evaluation sanctions.

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder